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No.

In the Supreme Court of the United States

CHAD SIGAFUS AND TERRI SIGAFUS
PETITIONERS,

v.

ST. LOUIS POST DISPATCH, L.L.C., PULITZER PUBLISHING COMPANY, PULITZER MISSOURI NEWSPAPERS, INC., PULITZER, INC., JOE HOLLEMAN, AND CAROLYN TUFT,
RESPONDENTS.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Eastern District

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the First Amendment to the United States Constitution protects the publishers for false and defamatory statements about the religious and political views of entertainers, who may be limited public figures to a narrow audience and specific market, and requires the entertainers to establish actual malice in their libel action, even though the false and defamatory statements were not related to the entertainers' audience and market.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent corporation or nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISION INVOLVED.....1

STATEMENT.....1

A. Factual Background.....2

B. Proceedings Below.....3

REASONS FOR GRANTING THE PETITION.....4

I. The Circuits are Divided Over Whether a Limited Public Purpose Public Figure is such a Figure for Any Controversy or Only What the Figure has Gained Notoriety For.....4

A. This Case Squarely Presents the Conflict.....4

B. A Uniform Test for Courts to Apply to Determine Whether an Individual is a Limited Purpose Public Figure is an Important and Recurring Question on Which Uniformity is Important.....7

TABLE OF CONTENTS - Continued

Page

II. The Decision Below is Incorrect.....9

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases: **Page(s)**

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S.749 (1985).....6, n. 3

Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986),
rev'd on other grounds sub nom., Hustler Magazine v. Falwell,
485 U.S. 46 (1978).....6

Foretich v. Capital Cities/ABC, Inc.,
37 F.3d 1541 (4th Cir. 1994).....5

General Products Co., Inc. v. Meredith Corp.,
526 F. Supp. 546 (D.C. Vir. 1981).....7

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).....4, 6, 7, 9

Hutchinson v. Proxmire,
443 U.S. 111 (1979).....9

James v. Garnett Co., Inc.
353 N.E.2d 834 (N.Y. 1976)..... 8

Jenoff v. Hearst Corp.,
644 F.2d 1004 (4th Cir. 1981).....8

Marcone v. Penthouse Int'l Ltd.,
754 F.2d 1072 (3rd Cir.), cert. denied,
474 U.S. 864 (1985).....8

TABLE OF AUTHORITIES – Continued

Cases: **Page(s)**

Martin v. Griffin Television, Inc.,
549 P.2d 85 (Okla. 1976).....8

O'Donnell v. CBS, Inc.,
782 F.2d 1414 (7th Cir. 1986).....5

Philadelphia Newspapers, Inc. v. Hepps,
475 U.S. 767 (1986)..... 6, n.3

Reuber v. Food Chemical News, Inc.,
925 F.2d 703 (4th Cir.), cert. denied,
111 S. Ct. 2814 (1991) 8

Rosanova v. Playboy Enterprises, Inc.,
580 F.2d 859 (5th Cir. 1978).....8

Schiavone Construction Co. v. Time, Inc.,
847 F.2d 1069 (3rd Cir.1988)..... 8

Silvester v. American Broad. Cos., Inc.
839 F.2d 1491, 1494 (11th Cir. 1988)..... 5

Steaks Unlimited, Inc. v. Deaner,
623 F.2d 264 (3rd Cir. 1980)..... 7

Time, Inc. v. Firestone,
424 U.S. 448 (1976)..... 9

Unelko Corp. v. Rooney,
912 F.2d 1049 (9th Cir. 1990).....7

TABLE OF AUTHORITIES – Continued

Cases: **Page(s)**

Vegod Corp. v. Am. Broadcasting Cos., Inc.,
160 Cal. Rptr. 97 (Cal. 1979),
cert. denied, 449 U.S. 886 (1980).....7

Waldbaum v. Fairchild Publications, Inc.,
627 F.2d 1287 (D.C. Cir. 1980).....4, 5

Warner v. Kansas City Star Co.,
726 S.W.2d 384 (Mo. App., W.D. 1997).....6, 9

Wolston v. Reader's Digest Ass'n, Inc.,
443 U.S. 157 (1979)..... 9

Constitutional Provision:

The First Amendment to the United States
Constitution.....1

Miscellaneous:

Laurence Tribe, American Constitutional Law,
880-81 (2d ed. 1988).....5, n. 2

Robert Nagel, How *Useful is Judicial Review
in Free Speech Cases*, 69 Cornell L.
Rev. 302 (1984) ..... 6, n. 2

Henry Monaghan, *Of "Liberty" and "Property,"*
62 Cornell L. Rev. 405 (1977).....6, n. 2

PETITION FOR WRIT OF CERTIORARI

Chad Sigafus and Terri Sigafus petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Eastern District, Fourth Division, in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, Division Four (App., *infra*, a1-a13), is unreported.

JURISDICTION

The Missouri Court of Appeals, Eastern District, Division Four judgment was entered on April 1, 2003 (App., *infra*, a1-a13). A timely Application for Transfer to the Missouri Supreme Court was denied on July 3, 2003 (App., *infra*, a14). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT

This case presents a recurring question of broad practical importance relating to whether the First Amendment to the United States Constitution protects the publishers for false and defamatory statements about the religious and

political views of entertainers, who may be limited public figures to a narrow audience and specific market, and requires the entertainers to establish actual malice in their libel action, even though the false and defamatory statements were not related to the entertainers' audience and market. The Court has yet to announce specific standards in this regard, leaving individuals uncertain about their status as limited purpose public figures, and whether the First Amendment essentially immunizes the publisher of false and defamatory information by requiring proof of actual malice.

A. Factual Background

On Sunday, March 5, 2000 Respondent Pulitzer Inc. published in the St. Louis Post-Dispatch a series of articles about the Christian Identity movement in Missouri and across the country. (L.F. 2).[1] The headline of the St. Louis Post-Dispatch on March 5, 2000 stated "The F.B.I. calls it the nation's most dangerous hate group. And it's growing in Missouri." The March 5, 2000 article identified Petitioners as "affiliates" of the Christian Identity movement. (L.F. 6, 10-11).

Petitioners write and perform family oriented children's music and stories. Some of Petitioners work is secular and some is Christian-based. (L.F. 4). Petitioners owned and operated a business called Teeter Tot Records, which is the label through which Petitioners' recorded and marketed their music. (L.F. 4).

Petitioners were invited to appear and perform at the Gospel Gathering held on February 25-27, 2000 in Branson, Missouri. (L.F. 4). Petitioners performed at the Gospel Gathering, and their performance at the event was both secular and Christian. Petitioner Chad Sigafus was the sound

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[1] Record citations are to the "Legal File" filed in the Missouri of Court of Appeals, Eastern District.

engineer for the gathering. (L.F. 4-5). Petitioners sold CDs and cassette tapes at the "Gospel Gathering" and also distributed a catalog of music available for purchase. (L.F. 5).

Many characterize the Christian Identity movement as a "hate group." (L.F. 2-4). In the March 5, 2000 articles published by Respondents, Respondents identify some followers of Christian Identity. (L.F. 10-11). Petitioners are listed in an accompanying table as "affiliates" of the Christian Identity Movement. (L.F. 10-11).

B. Proceedings Below

1. Petitioners brought a libel/defamation action against Respondents in Missouri state court alleging that Respondents' publication of March 5, 2000, which includes a table indicating that Petitioners are affiliates of the Christian Identity Movement was false and defamatory because it reflects negatively on Petitioners' integrity, character, good name, and standing in the community, exposed Petitioners to public hatred, contempt, and ridicule, and has occasioned Petitioners to suffer business losses. Respondents filed a motion for summary judgment on the grounds that Petitioners are public figures and that the First Amendment required Petitioners to establish actual malice to recover damages from Respondents. The Missouri Circuit Court for the Twenty Second Judicial Circuit granted Respondents Summary Judgment. (App., *infra*, a15-a20).

2. A three-judge panel of the Missouri Court of Appeals, Eastern District upheld the granting of summary. (App., *infra*, a1-a13).

3. Petitioners timely sought an Application for Transfer to the Missouri Supreme Court, which was denied. (App., *infra*, a14).

REASONS FOR GRANTING THE PETITION

I. The Circuits are Divided Over Whether a Limited Public Purpose Public Figure is such a Figure for Any Controversy or Only What the Figure has Gained Notoriety For.

A. This Case Squarely Presents the Conflict

Since this Court held in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) that individuals become limited public figures by voluntarily "thrusting themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved," 418 U.S. at 345, lower courts have diverged greatly over whether such individuals are only public figures with respect to statements concerning the limited range of issues for which they are prominent, or whether their influence as public figures transcends the activities which places these individuals into the public eye.

This case typifies the conflict since Petitioners may well be limited purpose public figures relating to their music career. However, the lower court confused them with general public figures as it relates to Respondents' publications asserting that Petitioners are members of a notorious hate group, the Christian Identity Movement.

Lower courts have fashioned particular approaches to identifying limited purpose public figures. This has resulted in a number of distinct and conflicting analyses. In Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir. 1980), the District of Columbia Circuit adopted a definition of a limited purposes public figure as one who "is attempting to have, or realistically can be expected to have, a major impact on the resolution of a specific dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants." Id. at 1292. The court

promulgated a three step inquiry: (1) isolating the pertinent public controversy, (2) ascertaining the extent of the plaintiff's role in that controversy, and (3) determining whether the alleged defamation was germane to the plaintiff's participation in the controversy. 627 F.2d at 1296-98. The Eleventh and Seventh Circuits have followed this inquiry. See, e.g., Silvester v. American Broad. Cos., Inc., 839 F.2d 1491, 1494 (11th Cir. 1988) (stating that the proper standards for determining whether a plaintiff is a limited public figure were best set forth in Waldbaum); O'Donnell v. CBS, Inc., 782 F.2d 1414, 1417 (7th Cir. 1986) (same). In contrast, the Fourth Circuit has formulated five hallmarks of a limited public figure doctrine: (1) The plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation. Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

These cases demonstrate the widespread confusion among lower courts in assessing whether an individual is a limited purpose public figure, and to what extent the First Amendment obligates proof of actual malice. In fact, the vast majority of lower court rulings have failed to articulate any standards for evaluating a plaintiff's status. Even the specific standards developed by various circuits have shown themselves susceptible to diverse application and precluded predictable results.[2]

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[2] In fact, many scholars have called for reformulations of the Court's analysis in this area. See, e.g., Laurence H. Tribe, American Constitutional Law 880-81 (2d ed. 1988) (noting that the test determining whether a plaintiff voluntarily themselves injected herself into a public controversy requires judges "to determine whether a controversy is public; a determination indistinguishable from whether the subject matter

The confusion in the lower courts has come to the forefront in this case. Instead of citing the plethora of authority issued by this Court regarding public figures in defamation cases, the Missouri Eastern District Court of Appeals cited only to one case, a Missouri Western District Court of Appeals case (Warner v. Kansas City Star Co., 726 S.W.2d 384 (Mo. App., W.D. 1997)) in holding that Petitioners are limited purpose public figures. The lower court here set forth no specific test and displayed its complete lack of understanding the issue when it stated "not only were [Petitioners] limited public figures in their own right, but they also interjected themselves into the Christian Identity Movement controversy." (App., *infra*, a8). Interjecting oneself into a controversy is not separate and apart from being a limited public figure, but part of the test to determine whether an individual has acquired public figure status. Due to the confusion generated by the various tests and formulations, and the lack of any specific guidelines for two decades[3] the Missouri Eastern District Court of Appeals seems to be saying that Petitioners are public figures for all purposes.[4] As this Court's decisions indicate, this is not the law. General public figure status is rare. See, e.g., Gertz, 418 U.S. at 345. In fact, only those well-known individuals who are public opinion leaders, such as Ralph Nadar, Jimmy Carter, or Jerry Falwell, are general public figures. See, e.g., Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986), rev'd on other grounds sub nom., Hustler Magazine v. Falwell, 485 U.S. 46 (1987).

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is of public or general concern"). Indeed, there have been recurrent attacks on the protection afforded to defamation plaintiffs. See, e.g., Robert Nagel, *How Useful is Judicial Review in Free Speech Cases?*, 69 Cornell L. Rev. 302 (1984); Henry P. Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405 (1977).

[3] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985); Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[4] In fact, the court never made the distinction between general public figures and limited purpose public figures.

B. A Uniform Test for Courts to Apply to Determine Whether an Individual is a Limited Purpose Public Figure is an Important and Recurring Question on Which Uniformity is Important.

As indicated by the lower courts confusing opinion in this case, a uniform test for courts to apply to determine whether an individual is a limited purpose public figure is an important and recurring question on which uniformity is important. There is no discernable pattern in lower court decisions and the determination of whether an individual is a limited purpose public figure has been based largely on ad hoc determinations, not reasoned analysis. For example, some courts hold that consumer product sales and marketing can constitute public controversies, citing the public's interest in the quantity, quality, and price of consumer goods. See, e.g., Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264 (3rd Cir. 1980) (large sales of meat to public a controversy); Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), cert. denied, 111 S.Ct. 1586 (1991) (automobile windshield failure a public controversy). However, other courts have found that consumer product sales are private business activities, and thus, not legitimate public controversies. See, e.g., Vegod v. Am. Broadcasting Cos., Inc., 160 Cal. Rptr. 97 (Cal. 1979), cert. denied, 449 U.S. 886 (1980) (availability and quantity of goods not a public controversy); General Products Co., Inc. v. Meredith Corp., 526 F.Supp. 546 (D.C. Vir. 1981) (chimney manufacturing not a public controversy).

A major area of confusion among lower court decisions, and evidenced by the confusing opinion in the lower court in this case, is the requirement that the plaintiff voluntarily rise to the forefront of public controversy in order to be a limited public purpose figure. Gertz, 418 U.S. at 345. Some courts have found that an individual rises to the

forefront of a public controversy by engaging in a pattern of activity destined to invite attention and comment. Whether the individual wants to be a public figure, or desires attention, is irrelevant. See Schiavone Construction Co. v. Time, Inc., 847 F.2d 1069, 1079 (3rd Cir. 1988); Reuber v. Food Chemical News, Inc., 925 F.2d 703, 709-710 (4th Cir.), cert. denied, 111 S. Ct. 2814 (1991). For instance, in Rosanova v. Playboy Enterprises, Inc., the Fifth Circuit held that an underworld mobster was a public figure because he engaged in a course of criminal conduct which was bound to invite attention. The fact that he did not want the attention was deemed immaterial. Rosanova, 580 F.2d 859, 861 (5th Cir. 1978). Similarly, in Marcone v. Penthouse Int'l Ltd., the Third Circuit held that an attorney representing a motorcycle gang involved in drug trafficking was a public figure. Marcone, 754 F.2d 1072, 1083 (3rd Cir.), cert. denied, 474 U.S. 864 (1985). In contrast, other decisions suggest that an individual must actively seek public attention in order to meet the voluntariness requirement of Gertz. These courts hold that to be a public figure, an individual must take affirmative steps to attract public attention, such as using the media, in order to influence the controversy's outcome. See, e.g., James v. Garnett Co., Inc., 353 N.E.2d 834, 839 (N.Y. 1976). In these cases, merely engaging in activity which draws attention is insufficient. For example, in Jenoff v. Hearst Corp., the Fourth Circuit held that a police informant was not a public figure even though there was much public debate about the use of informants. The court reasoned that the informant in that case did not, himself, generate the attention he received. Jenoff, 644 F.2d 1004, 1007-1008 (4th Cir. 1981). Similarly, in Martin v. Griffin Television, Inc., the Oklahoma Supreme Court held that a pet shop owner was not a public figure with regard to statements about the condition of his store, despite the fact that there was an ongoing public controversy over the treatment of animals in general and over the plaintiff's store in particular. Martin, 549 P.2d 85, 89 (Okla. 1976).

This Court needs to clarify the limited public figure doctrine to avoid an ongoing body of conflicting decisions, as noted above. This Court has found plaintiffs not to be public figures largely because they did not engage in the type of activity characteristic of public figures. See, e.g., Time, Inc. v. Firestone, 424 U.S. 448 (1976) (divorce proceeding, even one involving a wealthy individual not a public controversy); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (little known behavioral scientist not a public figure; those who defame cannot, by their statements, create a defense by converting the victim into a public figure); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157 (1979) (limited purpose public figure is subject to the actual malice requirement only for defamatory statements which relate to the limited range of issues for which the individual is prominent). However, this Court has never set forth any specific guidelines as to what type of activity is required.

I. The Decision Below is Incorrect

The court below arrived at the conclusion that Petitioners are public figures by repeatedly misconstruing this Court's precedents. This Court held as early as Gertz v. Robert Welch, Inc., 418 U.S. 351-52, that individuals are public figures only with respect to statements concerning the limited range of issues for which they are prominent. Id. at 351-52. Instead of addressing this requirement, the lower court merely pointed out why the Western District for the Missouri Court of Appeals decision was in error in Warner. In finding that the Warner court's holding correctly found Mr. Warner to be a public figure, the court stated: "[T]he statements made about Warner were that he made misrepresentations regarding an automobile he took as a gift from a company he covered as a writer and editor, and that taking gifts from companies was a problem. The statements had nothing to do with outdoor life per se." (App., *infra*, a8). The lower court's opinion underscores the confusion of lower

courts in general and only this Court can lay to rest the uncertainty and confusion regarding the limited purpose public figure doctrine.

CONCLUSION

The petition for writ of certiorari should be granted.

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OCTOBER 2003

Appendix

Page(s)

Missouri Court of Appeals, Eastern District,
Division 4 Opinion, Dated April 1, 2003.....a1-a13

Denial of Application for Transfer to Missouri
Supreme Court Dated July 3, 2003.....a14

Missouri Circuit Court, Twenty-Second Judicial
Circuit Order and Judgment,
Dated April 12, 2002.....a15-a20

In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

CHAD AND TERRI SIGAFUS,	)	No. ED81268
	)	
Appellants,	)	Appeal from the
	)	Circuit Court of the
	)	City of St. Louis
v.	)	
	)	
ST. LOUIS POST-DISPATCH, L.L.C., PULTIZER PUBLISHING COMPANY, PULITZER MISSOURI NEWSPAPER, INC., PULITZER, INC., JOE HOLLEMAN, and CAROLYN TUFT,	)	Hon. Margaret M. Neill
	)	
Respondents.	)	Filed: April 1, 2003

Introduction

Chad and Terri Sigafus (collectively Appellants) appeal from the trial court's Summary Judgment in favor of St. Louis Post-Dispatch, L.L.C., Pulitzer Publishing Company, Pulitzer Missouri Newspapers, Inc., Pulitzer, Inc., Joe Holleman and Carolyn Tuft (collectively Respondents) and against Appellants. We affirm.

Factual and Procedural Background

On March 5, 2000, the St. Louis Post Dispatch published an article reporting on a conference of the

Christian Identity Movement held over the weekend of February 25-27, 2000 in Branson, Missouri called the "Gospel Gathering." Chad Sigafus was the sound engineer for the gathering. Appellants performed music at the event, sold compact discs and cassette tapes of their music at the event and distributed a catalogue of their music available for purchase as well. The article stated that the Christian Identify Movement is Comprised of white supremacists and anti-Semites, and listed Appellants as affiliates of the Christian Identity Movement.[1] Thereafter, Appellants brought a cause of action against Respondents for defamation, claiming that the article falsely affiliated them with the Christian Identity Movement. Respondents moved for Summary Judgment, claiming that Appellants cannot bring a cause of action for defamation against Respondents based on the article, because Appellants are public figures, and Appellants presented no evidence of actual malice. The trial court granted Respondents' Motion for Summary Judgment based on these arguments. Appellants appeal from the judgment, presenting two points on appeal.

Standard of Review

Appellate review of a trial court's grant of summary judgment is essentially de novo. ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment will be upheld on appeal if the movant is entitled to judgment as a matter of law and no genuine issues of material fact exist. Id. at 377. One way a defending party may establish a right to judgment as a matter of law is by showing undisputed facts that negate any one of the elements of the plaintiff's cause of action. Id. at 381.

Appellants assert that certain items of evidence that Respondents have submitted on appeal in support of their

[1] Appellants are listed in a table of 17 Missouri affiliates as pastor or owner of Teeter-Tot Records in Couch, Missouri.

response "are not matters within the scope of this appeal." Appellants argue that these items were the subject of a motion to strike they submitted to the trial court. The trial court did not rule upon the motion because it considered the motion to be moot, as the court did not rely on any of the items contained in the motion when granting Respondents' Motion for Summary Judgment. Appellants claim that "it is a fundamental concept of appellate review that an appellate court 'will not consider questions not ruled upon by a District Court,'" citing Governo v. Standard Oil Co., 192 F.2d 962, 963-64 (8th Cir. 1951).

Appellants' reliance on Governo is misplaced, as it involves issues not presented to the trial court, and thereby not preserved for appeal.[2] The instant case involves items of evidence, not issues, which in fact were presented to the trial court.

De novo review means that the criteria that we use on appeal for testing the propriety of summary judgment are no different from those that are employed by the trial court to determine the propriety of sustaining the motion initially. ITT, 854 S.W.2d at 376. When the appellate court reviews a summary judgment, it looks to the *entire record*, just like the trial court did, to determine if there is any issue of material fact and whether the moving party is entitled to judgment as a matter of law. Dial v. Lathrop R-II School Dist., 871 S.W.2d 444, 446 (Mo.banc 1994). The entire record in this case includes the evidentiary items about which Appellants complain.

Further, the propriety of summary judgment is purely an issue of law and the appellate court need not defer to the trial court's order granting summary judgment. Stone v. Crown Diversified Industries Corp., 9 S.W.3d 659, 644

[2] Although Appellants have cited a federal case, this rule happens to apply to state courts as well.

(Mo.App. E.D. 1999). A trial court's order granting summary judgment can be affirmed on appeal on an entirely different basis than that posited at trial. ITT, 854 S.W.2d at 387-388.

Accordingly, we reject Appellants' argument that the evidentiary items at issue are not within the scope of this appeal.

Point I

In their first point, Appellants contend that the trial court erred in granting Summary Judgment in favor of Respondents because Appellants are not public figures in that Appellants have insufficient access to the media, did not voluntarily rise to the forefront or seek to influence the outcome of the controversy, are not prominent as to the issues raised, and merely sought to promote their wholesome music by appearing at the Gospel Gathering.

Discussion

The elements of defamation in Missouri are: 1) publication, 2) of a defamatory statement, 3) that identifies the plaintiff, 4) that is false, 5) that is published with the requisite degree of fault, and 6) damages the plaintiff's reputation. Overcast v. Billings Mutual Ins. Co., 11 S.W.3d 62, 70 (Mo.banc 2000).

Warner v. Kansas City Star Co., 726 S.W.2d 384 (Mo.App. W.D. 1987) is the most relevant Missouri case concerning who is a public figure for defamation purposes. As it was in Warner, 726 S.W.2d at 385, the threshold question in this case is whether Appellants are public figures. If Appellants are public figures, Respondents are protected by the First Amendment from liability for damages for defamation, unless the defamatory statements were published

with actual malice on the part of Respondents—that is, with knowledge that the statements were false, or with reckless disregard as to whether they were true or false. Id., citing Gertz v. Robert Welch, Inc., 418 U.S. 232, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and McQuoid v. Springfield Newspapers, Inc., 502 F.Supp. 1050, 1054 (W.D.Mo. 1980).

In Warner, the plaintiff Gary D. Warner (Warner) was an outdoor writer and editor for the Kansas City Star. Warner sued the newspaper for libel when it published an article on the practice of merchants and manufacturers of sporting goods in furnishing gifts to outdoor writers, stating that reporters uncovered information that Warner had misrepresented the arrangements under which he had obtained a vehicle as a gift from a company he covered as a writer and editor. The Western District made the following findings in concluding that Warner was a limited purpose public figure for purposes of the alleged libel:

> We conclude, as did the trial judge that Warner for the purposes of the alleged libel was a limited purpose public figure. For seven years he had been the outdoor editor of a metropolitan daily newspaper, with a weekly circulation of 250,000-400,000 and a Sunday circulation of 400,000-500,000. In that capacity he had regularly written prominently featured articles for the outdoor section of the newspaper, of which he was identified, by name and title, as the author. The outdoor section was concerned with such subjects as fishing, hunting, boating and camping. Warner was well known to a wide audience of people interested in the outdoor life....Over a span of four or five years he had received recognition for his writing and for his promotion of conservation causes....

> The evidence projects a picture of a person who "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements."
>
> Furthermore, influence over the attitudes and beliefs of others in the field of plaintiff's credentials, was of value to him as a professional outdoor writers. His authority, the weight of his views, increased with his fame. It is inherent in his position that he invited public attention to himself and to his views. These factors are taken into account in weighing whether one is a public figure, and, in Warner's case, are indicia of that status. [citations omitted].

Warner, 726 S.W.2d at 385-386.

In the instant case, Appellants are, in their own words, nationally known recording artists. Appellants own and operate a business called Teeter-Tot Records and use this label to record and market their music. Appellants have sold thousands of cassette tapes and compact discs of their music in the United States, Canada, England, Ireland and Australia. Since at least 1990, Appellants have regularly performed live on stage throughout the United States.

Appellants concede that as of March 5, 2000, the date of publication by Respondents in this case, Appellants had a national reputation as performers of children's music. Silo Music, which is a major nationwide distributor of children's music, Rounder Records, and several other distributors promoted and sold Appellants' music. As of March 5, 2000, Appellants had sent out a large amount of promotional materials and sample recordings to promote themselves and their careers to the public. Appellants' first album was in approximately two hundred stores nationwide. Appellants

now have approximately 15 albums. Newspapers and trade publications review Appellants' music, including Family Fun magazine, Choice Music for Kids magazine, Billboard, Booklist, and Christian Parenting Today. Appellants solicited these reviews by sending cuts of recordings to these magazines. Appellants have played alone and with other performers such as Leon Redbone and the Marshall Tucker Band. Appellants have frequently provided interviews to newspapers, including the Chicago Tribune, and radio stations, including WGN in Chicago, while visiting cities to perform. Terri Sigafus has written three children's books, available for sale to the public. She has also created two videotapes for children, similar to a Mr. Rogers program, in which she appears as Claire LeBear. These videotapes are also promoted and sold to the public.

It is clear to us that like Warner, Appellants were well known to a wide audience of people interested in religious and children's music.[3] Also, like Warner, over a span of several years Appellants have sought and received national recognition for their songs and musical performances. Appellants also sought and were granted access to the media when they wanted. We find that here, like in Warner, the evidence projects a picture of people who "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements." Warner, 726 S.W.2d at 385-386. Also similar to the Western District's findings as to Warner, it is inherent in Appellants' activities that they invite public attention to themselves and their views, because of the religious nature of their public performances, as well as the cassette tapes and compact discs they disseminated nationally, and the interviews they sought and were granted. These factors are

[3] We find the distinction between writing and editing articles about outdoor life, and writing, singing and editing songs about religion, to be a distinction without a difference in this case.

taken into account in weighting whether one is a public figure, and, in Appellants' case, are indicia of that status.

Appellants attempt to distinguish Warner by stating that Warner was a limited purpose public figure in the area of outdoor life, and thus statements regarding his termination were related to his credibility in the field that he gained notoriety. Appellants argue that the statements published by Respondents in this case had nothing to do with Appellants' production of children's music. On the contrary, the statements made about Warner were that he made misrepresentations regarding an automobile he took as a gift from a company he covered as a writer and editor, and that taking gifts from companies was a problem. The statements had nothing to do with outdoor life per se. Appellants attempt to equate bribery and/or kickbacks with the outdoor life, which is ludicrous.

In properly following the reasoning of Warner, we conclude that Appellants' status as limited public figures does not limit the statements made about Appellants by Respondents to those concerning only children's music.

Not only were Appellants limited public figures in their own right, but they also interjected themselves into the Christian Identity Movement controversy, as evidenced by the following facts.

Appellants have on numerous occasions voluntarily and without a performance fee, as Chad Sigafus confirms in his deposition, performed music onstage at public events featuring Christian Identity Movement speakers. In 1996, Chad Sigafus acted as videographer and principal editor of a videotape, prepared for public sale, on which he also performed, singing "The Truth will set you free" as the closing anthem, entitled "IDENTITY, Identifying God's chosen" (Identity Tape). In his deposition, Chad Sigafus

testifies as to his involvement as videographer and editor, as well as performer, in creating the Identity Tape. The identity Tape's jacket states that it is a "58 1/2 minute documentary professionally produced and shown to millions of Americans over Cable television, home video sales and rentals." The Identity Tape espouses the Christian Identity Movement's views and values, including several speakers who proclaim whites as God's chosen people and condemn Jews, non-whites and whites who associate with non-whites. We need not go into the details of the views espoused by the Identity Tape speakers and participants, who are named below. Suffice it to say the views are clearly racist and anti-Semitic. These same speakers and participants organized, promoted or spoke at events which Appellants later publicly performed an participated, as set out below.

Throughout 1995 and 1996, Appellants regularly attended and performed during services at the church of Christian Identity Movement pastor Everett Ramsey (Ramsey), the producer of the Identity Tape. In the summer of 1996, Appellants performed at a Bible camp organized by Pete Peters (Peters), which included Ramsey and David Barley (Barley) as speakers. Peters and Barley were involved in the production of the Identity Tape as well. In the fall of 1996, Appellants performed at a gathering at which Ramsey and Ted Weiland (Weiland) spoke. Although Weiland's views are not presented on the Identity Tape, he voiced them at the 1998 and 1999 Gospel Gatherings, as contained in the audiotapes of those events. These views include that God's laws require that civil leaders be white, Christian men, that whites have been duped into thinking that the world is overpopulated, and that whites should have eight children per couple so whites can take America back.

In April 1997, Appellants appeared at a conference held in Branson hosted by Ramsey at which Peters spoke. In August 1997, Appellants appeared at an America's Promise

Gathering in Albuquerque, New Mexico, along with Barley, Ramsey and Peters. In February 1998, Appellants performed at the first of four Songs for His People Gatherings in Branson. Weiland and James Bruggeman (Bruggeman), the moderator of the Identity Tape, spoke at the event. In May 1998, Appellants performed live in Indianapolis at a gathering sponsored by Weiland, at which Bruggeman spoke. In February 1999, Appellants performed at the second Songs for His People Gatherings in Branson, at which Weiland spoke. In the summer of 1999, Appellants performed at the third Songs for His People Gathering in Branson, at which Weiland was the main speaker. In September 1999, Appellants performed in Estes Park, Colorado, at a gathering sponsored by Weiland.

The views presented in the Identify Tape and espoused by its creators and participants are clearly racist and anti-Semitic, and therefore controversial. Also clear is that Appellants interjected themselves into this controversy by their participation in the creation of the Identity Tape, a "58 1/2 minute documentary professionally produced and ***shown to million of Americans over Cable television, home video sales and rentals***," and by their frequent performance, as "***nationally known recording artists***," in their own words, at subsequent gatherings of Identity Tape speakers and creators.

For the foregoing reasons, we find that Appellants are limited purposes public figures, and thus trial court did not err is so finding. Point I is denied.

Point II

In their second point, Appellants maintain that the trial court erred in awarding Summary Judgment to Respondents because Respondents published the articles in question with actual malice in that Respondents falsely attributed the source of their information to the Southern

Poverty Law Center and the FBI, failed to retract their false statements, preconceived the story line prior to publication, and misstated the evidence to make it seem more convincing than it was.

Discussion

As noted in our discussions of Point I, because Appellants are public figures, Respondents are protected by the First Amendment from liability for damages for defamation, unless the defamatory statements were published and actual malice on the part of Respondents—that is, with knowledge that the statements were false, or with a reckless disregard as to whether they were true or false. Warner, 726 S.W.2d at 385; Gertz, 418 U.S. at 334; McQuoid, 502 F. Supp. at 1054.

At summary judgment stage in a defamation action which has constitutional implications, a public figure plaintiff is required only to submit evidence which shows a genuine issue of material fact form which a reasonable jury could find actual malice with convincing clarity. Bauer v. Ribaudo, 926 S.W.2d 38, 42 (Mo.App. E.D. 1996).

Appellants maintain that Respondents conceded that they falsely attributed the source of their information that Appellants were affiliates of the Christian Identity Movement to the Southern Poverty Law Center, and that this concession alone suffice to create a disputed issue, making summary judgment improper.

Appellants fail to present any evidence that this incorrect attribution is more than a mistake, and was done with actual malice. Negligence is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice." New York Times Co. v. Sullivan,

376 U.S. 254, 286-88 (1964); Glover v. Herald Co., 549 S.W.2d 858, 861 (Mo.banc 1977).

Additionally, Appellants present no evidence that Respondents knew of the inaccuracy of their source attribution at the time the article was published. This showing is a requirement for actual malice. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512 (1984); New York Times Co.; 376 U.S. at 286-88; Glover, 549 S.W.2d at 861.

Appellants also contend that the articles imply that the FBI determined Appellants to be members of the Christian Identity Movement. However, Respondents maintain that the FBI's Megiddo report, on which Respondents relied for their generalized descriptions concerning The Christian Identity Movement, did not mention Appellants' role in the Christian Identity Movement, nor did Respondents' articles suggest that it did. Further, Respondents presented evidence that they relied on sources other than the FBI to ascertain Appellants' role in the Christian Identity Movement. These sources included John Hickey (Hickey), the director of Progressive Vote; Hickey and Scott Moore (Moore), of the Missouri Citizens Education Fund; David Warren (Warren), Regional Director of the Anti-Defamation League; Larry Giddens (Giddens), who had attended Christian Identity Movement events and knew that Appellants were close to the Farnums, whose organization Songs for His People was known Christian Identity Movement affiliate and the promoter of the 2000 Gospel Gathering; as well as Tuft's personal observations of Appellants' activities and role at the 2000 Gospel Gathering. Based on these sources of information and personal observations, Respondents maintain that they honestly believed when they published the article, and still do

believe that Appellants were and are affiliates of Christian Identity Movement.[4]

Because Appellants have not presented sufficient evidence that Respondents printed the article at issue with actual malice, Point II is denied.

Conclusion

The judgment of the trial court if affirmed.

s/Sherri B. Sullivan
Sherri B. Sullivan, Judge

William H. Crandall, Jr., P.J., and
Glenn A. Norton, J., concur.

[4] We note that the trial court found, and this finding still stands, that there exists a material issue of fact as to whether Appellants are, in fact, Christian Identity Movement affiliates.

In the Missouri Court of Appeals
Eastern District

To: Attorneys of Record

From: Laura Thielmeier Roy, Clerk

Date: July 3, 2003

Re: Application for Transfer to Supreme Court Denied

1. ED81268 CHAD SIGAFUS, ET AL, APP V STL POST DIS ET AL, RES

MISSOURI CIRCUIT COURT -
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

CHAD SIGAFUS, et al.,	)	
	)	
Plaintiffs,	)	Cause No. 002-6926
	)	
vs.	)	Division No. 1
	)	
ST. LOUIS	)	
POST DISPATCH,	)	
L.L.C., et al.,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT

The Court has before it Defendants' motion of summary judgment, and both Plaintiffs' and Defendants' motions to strike. The Court has reviewed the record and now rules as follows.

Plaintiffs brought the present defamation action in which they allege that they were falsely affiliated with the Christian Identity religion in an article that appeared in the St. Louis Post-Dispatch on March 5, 2000, reporting on a gathering of followers at a conference in Branson, Missouri, on the weekend of February 25, 2000. The conference was called the "Gospel Gathering." Plaintiffs were invited to perform music and to provide sound engineering services at the conference. Plaintiffs also sold recordings of their music at the event. They state that their music and performances did not reflect the beliefs of Christian Identity as described in the Post-Dispatch article, which was written and published by Defendants.

According to the article, Christian Identity is not a religion, but rather a dangerous hate group whose followers

"adhere to a whites only, gay-bashing, Jew-hating doctrine." The article further states that Missouri has 17 Christian Identity "affiliates." Plaintiffs are listed in an accompanying table of affiliates as the pastor or owner of Teeter-Tot Records in Couch, Missouri. The listed sources of the tabular information are "The Directory of Covenant People (Israel Identity)" and the Southern Poverty Law Center.

Plaintiffs allege that a reasonable investigation by Defendants would have revealed that Plaintiffs were not affiliated with Christian Identity, and that the article and table are false and misleading in that they indicate that the FBI and the Southern Poverty Law Center consider Plaintiffs to be affiliates of Christian Identity when neither organization has drawn that connection. Plaintiffs further allege that they have been subjects to contempt and ridicule in their community, have suffered business losses, and have been listed as Christian Identity followers on anti-hate group internet sites as a result of the defamatory publication. Defendants move for summary judgment contending that Plaintiffs cannot prove falsity and that Plaintiffs are public figures and cannot prove actual malice.

When ruling on a motion for summary judgment, the Court must determine whether the moving party has "the undisputed right to judgment as a matter of law, " on the basis of the facts about which there is no genuine dispute. ITT Commercial Finance Corporation v. Mid-America Finance Corporation, 854 S.W.2d 371, 380 (Mo.banc 1993). The party moving for summary judgment bears the burden of establishing a right to judgment as a matter of law. Any evidence in the record presenting a genuine dispute as to the material facts defeats that moving party's prima facie showing. Id. at 382.

Where the movant is the defending party, the movant may establish a right to judgment by showing facts that negate any one of claimant's elements' facts, that the non-movant after an adequate period of discovery has not been able to produce evidence sufficient to allow the trier of fact to

find the existence of any one of claimant's elements, or that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly pleaded affirmative defense. ITT at 381.

Once the moving party has met the burden imposed by Rule 74.03(c) by establishing a right to judgment, the non-movant's only recourse is to show by affidavit, depositions, answers to interrogatories, or admissions on file, that one or more of the material facts shown by movant is in fact genuinely disputed. Id. at 381.

To state a cause of action for defamation as to a private person, the Plaintiff must show: 1) the Defendant published a defamatory statement; 2) the Defendant was at fault in publishing the statement; 3) the statement tended to expose Plaintiff to hatred, contempt and ridicule; 4) the statement was read by other persons or by the public; and 5) Plaintiff's reputation was thereby damaged. MAI 23.06(1); Dugan v. Pulitzer Publishing Company, 913 S.W.2d 807, 810 (Mo.App.E.D. 1995). The question of whether a statement is defamatory is one of law. Pape v. Reither, 918 S.W.2d 376, 379 (Mo.App. E.D. 1996). In considering an alleged defamatory remark, the Court should determine wither the statement is capable of having a defamatory meaning. Id. Further, the alleged defamatory language must be stripped of any pleaded innuendo, read in context, and given its plain and ordinarily understood meaning. Bauer v. Ribaudo, 926 S.W.2d 38, 41 (Mo.App. E.D. 1996). Once a statement is found to be defamatory, the next inquiry is whether one or more privileges applies. Pape, at 380.

Here, Defendants first contend that the undisputed evidence regarding Plaintiffs' association with Christian Identity shows that the statements made by Defendants were not materially false. Defendants have adduced evidence that Plaintiffs were actively involved in the Gospel Gathering, that the Gospel Gathering was a Christian Identity event, and that from 1996 to the date of the allegedly defamatory article, Plaintiffs participated in number of events associate with

Christian Identity beliefs, and that Plaintiff Chad Sigafus videographed, edited, and performed on a videotape that describes and promotes Christian Identity values.

Plaintiffs argue that that they do not adhere to Christian Identity beliefs, and have presented evidence in support of their argument. Plaintiffs have presented evidence that they are not affiliates of Christian Identity. Thus, the Court must find that there is a question of material fact a s to whether Plaintiffs were affiliated with Christian Identity.

However, Defendants also contend that Plaintiffs are public figures. If the Plaintiff in a defamation action is a public figure, the Defendant is protected by the First Amendment of the United States Constitution from liability, unless the defamatory statements were published with actual malice on the part of Defendant. Warner v. The Kansas City Star Company, 726 S.W.2d 384, 385 (Mo.App. W.D. 1987). A statement is published with actual malice if it was published with knowledge that tit was false, or with reckless disregard as to whether it was true or false. Id. Whether an individual is a public figure is a question of law for the Court to decide. Id.

A person can be deemed a public figure for purposes of the First Amendment for either of two reasons: he occupies such a position of power and influence that the is a public figure for all purposes, or he has obtained a place at the forefront of a particular public controversy in order to influence the resolution of the issues involved. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). The reasoning in requiring a public figure to show that the defamatory statement was published with actual malice is that public figures are less vulnerable to injury because of their ability to communicate to the public and because they are considered to be less deserving of protection because they have voluntarily exposed themselves to the risk of a defamatory statement. Wolston v. Reader's Digest Association, Inc., 443 U.D. 157, 164 (1979).

Defendants argue that Plaintiffs have voluntarily involved themselves with Christian Identity, and that Christian Identity is a matter of public interest and concern. Defendants further argue that Plaintiffs are nationally known musicians who have sold their work in Canada, England, Ireland, and Australia, and that have been reviewed by prominent industry magazines. Defendants have adduced evidence that Plaintiffs have expended a considerable effort to promote their music and their performances, including sending promotional materials to newspapers, television stations, and radio stations across the country.

Plaintiffs argue that their musical career does not make them public figures. Plaintiffs contend that they are analogous to the Plaintiff in Wolston v. Readers Digest Association, 443 U.S. 157 (1979). In Wolston, the Defendant published a book in which the Plaintiff was listed as a Soviet espionage agent. When Plaintiff brought suit for defamation, Defendant argued that Plaintiff was a public figure and therefore the First Amendment precluded recovery unless Plaintiff could show that that statement was published with actual malice. The Plaintiff had been subpoenaed by a grand jury to testify, failed to respond, and was cited for contempt. The Supreme Court held that the Plaintiff had not voluntarily entered into a public controversy, but instead that the Plaintiff had unwillingly been dragged into the controversy. Id. at 166.

The Court finds that this case is inapposite with Wolston. Here, Plaintiffs voluntarily sought and attained publicity to promote their musical careers. Plaintiffs admit that they have a national reputation as performers of children's music. Plaintiffs have the ability to communicate to the public and have voluntarily exposed themselves to the risk of defamatory statement. Thus, the Court finds that Plaintiffs are public figures.[1] Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 164 (1979). The Court

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[1]The Court notes that plaintiffs performed their music at the Gospel Gathering.

further finds that Plaintiffs have presented no evidence of actual malice on the part of Defendants. Therefore, summary judgment in favor of Defendants is appropriate. In determining that summary judgment is appropriate, the Court has not considered or relied upon any of the contested materials in either Plaintiffs' or Defendants' motion to strike, and both motion s are denied as moot.

WHEREFORE IT IS ORDERED that Defendants motion for summary judgment is granted. Both Plaintiffs' and Defendants' motions to strike are denied as moot. Judgment is entered in favor of Defendants and against Plaintiffs. Costs are taxed to Plaintiffs.

SO ORDERED:

s/Margaret M. Neill
Margaret M. Neill,
Presiding Judge

Dated: April 12, 2002

cc: Benjamin A. Lipman
Robert C. Seibel

(2)

No. 03-807

Supreme Court, U.S.
FILED
JAN 5 - 2003
OFFICE OF THE CLERK

In The Supreme Court of the United States

CHAD SIGAFUS AND TERRI SIGAFUS,

Petitioners,

v.

ST. LOUIS POST DISPATCH, L.L.C., PULITZER PUBLISHING COMPANY, PULITZER MISSOURI NEWSPAPERS, INC., PULITZER INC., JOE HOLLEMAN, AND CAROLYN TUFT,

Respondents.

On Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Rule 29 Corporate Disclosure

Pulitzer Inc. is the parent company of St. Louis Post-Dispatch L.L.C. Pulitzer Publishing Co. ceased to exist in 1999. Pulitzer Inc. is the parent company of Pulitzer Missouri Newspapers, Inc. Gabelli Asset Management, Inc. owns more than 10% of the common stock of Pulitzer Inc.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	iii
JURISDICTION	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
CONCLUSION	7
APPENDIX	A-1

TABLE OF AUTHORITIES

Page

CASES

Banks v. California, 395 U.S. 708 (1969) 3

Gorman v. Washington Univ., 316 U.S. 98 (1942) 4

Gotthilf v. Sills, 375 U.S. 79 (1963) 3, 4, 6, 7

Hoevelman v. Reorganized School District R2 of Crawford County, 452 S.W.2d 298 (Mo. App. S.D. 1970) 6

Hood v. M.F.A. Mutual Ins. Co., 379 S.W.2d 806 (Mo. App. S.D. 1964) 6

Matthews v. Huwe, 269 U.S. 262 (1925) 3, 6, 7

McMaster v. Gould, 276 U.S. 284 (1928) 3, 5, 6, 7

Stratton v. Stratton, 239 U.S. 55 (1915) 7

STATUTES

28 U.S.C. §1257(a) 3, 7

RULES

Mo.R. Civ. P. 83.02 3

Mo.R. Civ. P. 83.04 ..... 3, 4

JURISDICTION

This Court does not have jurisdiction of this case because Petitioners failed to file a timely application with the Missouri Supreme Court to have the case transferred from the Missouri Court of Appeals to the Missouri Supreme Court. As such, the Petition does not seek a writ to the highest state court in which a decision could be had.

SUMMARY OF THE ARGUMENT

Petitioners' Petition for Writ of Certiorari to the intermediate Missouri Court of Appeals should not be granted because Petitioners failed to use the proper procedure to request that the Missouri Supreme Court exercise its discretion to hear the underlying case. As a result of Petitioners' failure to use the proper procedure, the Missouri Supreme Court never considered whether to hear the case. Therefore, the decision Petitioners seek to have reviewed is not the decision of the highest court in which a decision could be had, which deprives this Court of jurisdiction.

The underlying case is a defamation action in which the trial court awarded summary judgment in favor of Respondents/Defendants. Petitioners appealed to the Missouri Court of Appeals, which affirmed the lower court's decision. Petitioners filed with the Missouri Court of Appeals an application for transfer of the case to the Missouri Supreme Court. The application was denied. Under Missouri rules, when the Court of Appeals denies an application for transfer, the party seeking transfer to the Missouri Supreme Court may then file a similar application directly with the Missouri Supreme Court.

Such an application must be filed within 15 days of the date on which the Missouri Court of Appeals denied the original application for transfer.

Petitioners did not file an application for transfer with the Missouri Supreme Court within 15 days of the order from the Missouri Court of Appeals denying transfer. Rather, Petitioners waited 90 days and filed with this Court their Petition for Writ of Certiorari to the Missouri Court of Appeals. After the Clerk of this Court informed Petitioners that they failed to seek transfer with the Missouri Supreme Court, Petitioners filed a request with the Missouri Supreme Court for leave to file out of time an application for transfer. The Missouri Supreme Court denied leave and never considered the application for transfer.

Because Petitioners failed to invoke simple procedures that would have resulted in the Missouri Supreme Court reviewing their application for transfer, the decision sought to be reviewed is not the decision of the highest court of Missouri in which a decision could be had. Therefore, this Court should deny the Petition for Writ of Certiorari.

ARGUMENT

This Court should not grant a writ of certiorari in the present case because it does not have jurisdiction to review the decision of the Missouri Court of Appeals. The writ being sought in this case would not go to the Missouri Supreme Court, which is the highest court in Missouri that could have rendered a decision. Rather, Petitioners seek a writ to an intermediate appellate court.

This Court "lack[s] jurisdiction to review" state court cases when the petitioner fails to ask the highest state court in which a decision could be had to review the judgment entered by a lower court. *Banks v. California*, 395 U.S. 708 (1969) (per curiam); *see also* 28 U.S.C. §1257(a) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .") This Court lacks jurisdiction in such cases even if the state court review that a petitioner passed up is discretionary. *Gotthilf v. Sills*, 375 U.S. 79, 79 (1963) (per curiam); *McMaster v. Gould*, 276 U.S. 284, 286-87 (1928); *Matthews v. Huwe*, 269 U.S. 262 (1925).

In the present case, prior to their initial attempt to file a Petition for Writ of Certiorari with this Court, Petitioners failed to file an application for transfer with the Missouri Supreme Court after the intermediate Court of Appeals denied an application for transfer. In Missouri, except in limited circumstances where an appeal may be taken as of right, appeals from the Missouri Court of Appeals to the Missouri Supreme Court are discretionary. After an adverse ruling in the Missouri Court of Appeals, a party can apply with that Court of Appeals for transfer of the case to the Missouri Supreme Court. Mo.R. Civ. P. 83.02. If such an application is denied, the party may then file a similar application with the Missouri Supreme Court. Mo.R. Civ. P. 83.04.

Petitioners' failure to timely apply for discretionary review with Missouri's highest court deprives this Court of jurisdiction over the present case. Many of this Court's precedents establish this governing rule of law. For instance, in *Gotthilf v. Sills*, this Court reviewed a case in which the New York County Supreme Court granted a

body execution against the petitioner, and the Appellate Division affirmed the decision on appeal. *Gotthilf v. Sills*, 375 U.S. at 79-80. The petitioner sought an appeal as of right with the Court of Appeals of New York, but that court dismissed the appeal because the underlying order did not finally determine the action. The petitioner also filed a motion in the Court of Appeals of New York for leave to appeal, but the motion was dismissed on the same grounds. *Id.* at 80. This Court granted certiorari, but then dismissed the writ as improvidently granted for want of jurisdiction. *Id.* This Court found that non-final orders could be taken to the Court of Appeals of New York by "leave of the Appellate Division upon certified questions." *Id.* However, the petitioner did not seek leave of the Appellate Division upon certified questions. Because the Appellate Division "was not the last state court in which a decision . . . could be had," its decision was not the decision of such a court. *Id.* (quoting *Gorman v. Washington Univ.*, 316 U.S. 98, 100 (1942)). Therefore, this Court did not have jurisdiction of the case.

In the present case, prior to filing their Petition for Writ of Certiorari with this Court, Petitioners filed an application with the Missouri Court of Appeals seeking transfer to the Missouri Supreme Court. That application was denied on July 3, 2003. *See* Petitioners' Appendix, p. a14. Under Missouri rules, an application for transfer filed with the Missouri Supreme Court "*shall* be filed with [the Missouri Supreme] Court within fifteen days of the date on which transfer was denied by the court of appeals." Mo.R. Civ. P. 83.04 (emphasis added). There is no provision for filing an application out of time. Fifteen days came and went and Petitioners did not file an application for transfer with the Missouri Supreme Court.

Ninety days after the Missouri Court of Appeals denied transfer (which was 75 days after Petitioners' time had run out to file with the Missouri Supreme Court), Petitioners filed (on October 1, 2003) their Petition for Writ of Certiorari with this Court. In *McMaster v. Gould*, this Court was faced with an almost identical situation. The petitioners had lost in front of the Appellate Division in New York and moved that court for leave to appeal to the Court of Appeals of New York. *McMaster v. Gould*, 276 U.S. at 285. Leave was denied. The petitioners then took an appeal without leave (assuming they could take it as of right), which was dismissed by the Court of Appeals of New York without opinion. *Id.* In New York, like Missouri, in certain special classes of cases, appeals may be taken from the Appellate Division to the Court of Appeals as of right. When the appeal does not fall within one of those special classes of cases, it may be taken when the Appellate Division certifies it for review or, if certification is denied, when "an appeal is allowed by the court of appeals." *Id.* at 286. This Court found that "the petitioners, when the Appellate Division refused them leave to appeal, did not make an application to the court of appeals for such leave." *Id.* As a result, this Court held that "the judgment is not that of the highest court of the state in which a decision could be had" and, therefore, dismissed the writ for want of jurisdiction. *Id.* at 287.

In the present case, this Court initially refused to docket the Petition for Writ of Certiorari because, according to the Clerk of this Court, the case was not "reviewed by . . . the highest state court in which a decision could be had." *See* Respondents' Appendix (attached hereto) at p. A-1 (letter from Supreme Court Clerk). In response, on October 17, 2003, Petitioners filed in the Missouri Supreme Court a

pleading entitled "Motion For Leave to File Application for Transfer to Missouri Supreme Court Out of Time." *See* Respondents' Appendix at pp. A-2 through A-5 (Motion for Leave filed with Missouri Supreme Court). At the same time, Petitioners filed the Application for Transfer, itself.

On October 23, 2003, the Missouri Supreme Court entered the following order: "Appellants' motion for leave to file application for transfer to the Missouri Supreme Court out of time [is] denied." *See* Respondents' Appendix at p. A-6 (Letter from Clerk of Missouri Supreme Court). Although, contemporaneously with their motion for leave to file out of time Petitioners filed an Application for Transfer to the Missouri Supreme Court, that application was never ruled on because leave to file out of time was denied.[1]

In *Gotthilf*, *McMaster* and *Matthews v. Huwe*, this Court determined that it did not have jurisdiction over appeals from state courts when the highest state court refused to hear an appeal because the petitioner failed to use the proper procedure to request such a hearing, even though such hearings were discretionary. In those cases, the petitioners sought an appeal as of right, but did not make all requests for discretionary appeal. In the present case, Petitioners failed to request a discretionary appeal

[1] The denial is not surprising given the state of the law in Missouri. The time limitations for filing applications when a Missouri Court of Appeals has rendered a decision are "cast in mandatory language and neither counsel nor the court is at liberty to ignore or wink at that limitation." *See, e.g.*, *Hood v. M.F.A. Mutual Ins. Co.*, 379 S.W.2d 806, 813 (Mo. App. S.D. 1964), *quoted in Hoevelman v. Reorganized School District R2 of Crawford County*, 452 S.W.2d 298, 303 (Mo. App. S.D. 1970) (per curiam).

within the applicable time constraints. Similar to the highest state courts in *Gotthilf*, *McMaster* and *Matthews*, the Missouri Supreme Court did not rule on Petitioners' Application for Transfer. Rather, the Missouri Supreme Court denied leave to file the Application for Transfer, which was out of time.

Because the Missouri Supreme Court never ruled on an Application for Transfer and because Petitioners failed to properly request that it do so, the Missouri Court of Appeals is not the highest state court in which a decision could be had. As a result, the decision sought to be reviewed is not the decision of the highest state court, and this Court may not exercise its certiorari powers pursuant to 28 U.S.C. §1257(a). *See also Stratton v. Stratton*, 239 U.S. 55 (1915). In *Stratton*, this Court explained that it cannot exercise jurisdiction by assuming what would have been the response of a highest state court in the event it had properly "been called upon to exert the discretion vested in it by state laws." *Id.* at 56. In other words, even if review by a state's highest court is purely discretionary, if that review is not properly sought then a writ of certiorari should not issue from this Court.

CONCLUSION

This Court does not have jurisdiction of this case because Petitioners failed to file a timely application with the Missouri Supreme Court to have the case transferred from the Missouri Court of Appeals to the Missouri Supreme Court. Because of Petitioners' failure, the Petition to this Court does not seek a writ to the highest state court

in which a decision could be had. Therefore, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

BENJAMIN A. LIPMAN
Counsel of Record
MICHAEL P. CASEY
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Attorneys for St. Louis Post Dispatch, L.L.C., Pulitzer Publishing Company, Pulitzer Missouri Newspapers, Inc., Pulitzer, Inc., Joe Holleman and Carolyn Tuft

APPENDIX

	Document Name	Page(s)
1.	Letter from United States Supreme Court	A-1
2.	Petitioners' Motion for Leave to File Application for Transfer with Missouri Supreme Court	A-2 through A-5
3.	Letter from Missouri Supreme Court denying leave to file Application for Transfer out of time	A-6

SUPREME COURT OF THE UNTIED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER October 8, 2003 AREA CODE 202
CLERK OF THE COURT 479-3011

Dennis Owens
7th Fl., Harzfeld's Building
1111 Main St.
Kansas City, MO 64105

RE: Chad Sigafus, et ux. v. St Louis Post Dispatch, et al.

Dear Mr. Owens:

The above-entitled petition for a writ of certiorari was postmarked October 1, 2003 and received October 7, 2003. The papers are returned for the following reason(s):

Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28 USC 1254 and 1257.

Returned are 39 copies of the petition and check #101083 in the amount of $300.

Sincerely,
William K. Suter, Clerk
By: /s/ [Illegible]

S. Elliott
(202) 479-3025

IN THE MISSOURI SUPREME COURT

CHAD SIGAFUS and TERRI SIGAFUS,	)	
Appellants,	)	
v.	)	No. ___
ST. LOUIS POST DISPATCH, L.L.C., PULITZER PUBLISHING COMPANY, PULITZER MISSOURI NEWSPAPERS, INC., PULITZER, INC., JOE HOLLEMAN, And CAROLYN TUFT,	)	
Respondents.	)	

APPELLANTS' MOTION FOR LEAVE TO FILE APPLICATION FOR TRANSFER TO MISSOURI SUPREME COURT OUT OF TIME

Appellants, Chad Sigafus and Terri Sigafus, by and through counsel undersigned, hereby request leave to make application for transfer to this Court pursuant to Missouri Supreme Court Rule 83.04, out of time. In support, Appellants state:

1. The Missouri Court of Appeals, Eastern District issued its Opinion on April 1, 2003.

2. Appellants timely filed an application for transfer to the Missouri Court of Appeals, Eastern District pursuant to Missouri Supreme Court Rule 83.02.

3. The Court denied the application on July 3, 2003. Exhibit A.

4. Counsel for Appellants incorrectly believed this ruling to be final for purposes of appeal to the Missouri courts system, and timely filed a Petition for Writ of Certiorari to the United States Supreme Court on October 1, 2003.

5. By letter dated October 8, 2003 (which was received by undersigned counsel on October 14, 2003) to co-counsel Dennis Owens, the United States Supreme Court returned Appellants Petition for Writ of Certiorari because Appellants had not technically appealed to, and been rejected by, this Court. Exhibit B.

6. Appellants ask this Court, over Respondents objections, to consider on their application for transfer under Missouri Supreme Court Rule 83.04.

/s/ [Illegible]
Robert C. Seibel, #44062
Mark J. Dean, #44079
SEIBEL & ECKENRODE, P.C.
7711 Bonhomme Ave., Ste. 400
St. Louis, MO 63105
(314) 726-6670 (Telephone)
(314) 726-2016 (Telecopier)
Attorney for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was mailed, postage prepaid, U.S. Mail, this 17 day of October, 2003, to the following party: **Robert B. Hoemeke, Michael P. Casey, John M. Hessel, Joseph E. Martineau, Benjamin A. Lipman**, Lewis, Rice & Fingersh, P.C., 500 N. Broadway, Ste. 200, St. Louis, MO 63102, Attorneys for Respondents St. Louis Post-Dispatch, L.L.C., Pulitzer Publishing Company, Pulitzer Missouri

Newspapers, Inc. and Pulitzer, Inc.; **Eastern District Court of Appeals**, Wainright State Office Building, Ste. 350, 111 North Seventh Street, St. Louis, MO 63101.

/s/ Mark Dean
Mark Dean

EXHIBIT A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER October 8, 2003 AREA CODE 202
CLERK OF THE COURT 479-3011

Dennis Owens
7th Fl., Harzfeld's Building
1111 Main St.
Kansas City, MO 64105

RE: Chad Sigafus, et ux. v. St Louis Post Dispatch, et al.

Dear Mr. Owens:

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Your case must first be reviewed by a United States court of appeals or by the highest state court in which a decision could be had. 28 USC 1254 and 1257.

Returned are 39 copies of the petition and check #101083 in the amount of $300.

Sincerely,
William K. Suter, Clerk
By: /s/ [Illegible]

S. Elliott
(202) 479-3025

EXHIBIT B

[LOGO]

In the Missouri Court of Appeals

Eastern District

TO: Attorneys of Record

FROM: Laura Thielmeier Roy, Clerk

DATE: July 3, 2003

RE: Application For Transfer To Supreme Court Denied

1. ED81268 CHAD SIGAFUS, ET AL, APP V. STL POST DIS ET AL, RES

[LOGO]

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI
65102

THOMAS F. SIMON
CLERK

TELEPHONE
(573) 751-4144

October 23, 2003

Mr. Robert C. Seibel
Mr. Mark J. Dean
Suite 400
7711 Bonhomme Avenue
St. Louis, MO 63105

In Re: Chad and Terri Sigafus, Appellants, vs. St. Louis Post-Dispatch, L.L.C., et al., Respondents.
Missouri Supreme Court No. SC85642
Eastern District No. ED81268

Dear Counsel:

Please be advised that the Court entered the following order on this date in the above-entitled cause:

'Appellants' motion for leave to file application for transfer to the Missouri Supreme Court out of time denied."

Very truly yours,

THOMAS F. SIMON

Cynthia L. Turley
Deputy Clerk, Court en Banc

cc:

✓Mr. Robert Hoemeke, Mr. Michael Casey, Mr. John Hessell, Mr. Joseph Martineau and Mr. ✓Benjamin Lipman
Clerk, Eastern District Court of Appeals